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No. 98-1441

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner*,

v.

LUCIO FLORES ORTEGA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I.

THE CASES CITED BY RESPONDENT ARE INAPPOSITE: THEY INVOLVE CONVICTIONS AFTER TRIAL, OR REQUIRE THAT A DEFENDANT ASK FOR AN APPEAL OR THAT TRIAL COUNSEL KNOW OF DEFENDANT'S DESIRE TO APPEAL

Respondent essentially claims the rule of *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), is not a "new rule" but is supported by long-established precedent. (Respondent's Brief in Opposition ["Opp'n Br."] at i, 1, 3-8.) Respondent cites numerous cases which purportedly support this position. In fact, the cases cited by Respondent are inapposite: frequently they are distinguishable because they involve convictions after trial as opposed to convictions after guilty plea; or they require that the defendant ask for an appeal or that trial counsel know of defendant's desire to appeal. *Stearns* was a guilty plea case which required only that petitioner show that he did not consent to counsel's failure to file a notice of appeal. 68 F.3d at 329, 330. Thus, *Stearns*, which was decided after Respondent's case became final, is a "new rule" barred by *Teague v. Lane*, 489 U.S. 288 (1989).

The distinction between conviction after trial and conviction after guilty plea is important because in California a guilty plea admits all matters essential to the conviction. (Petition for Writ of Certiorari at 22-23 [hereafter "Pet."].) Indeed, California generally requires a certificate of probable cause to appeal from a judgment following a guilty plea. (Pet. at 23.)

Many of the cases cited in Respondent's brief involved convictions by trial as opposed to convictions by guilty plea. Such cases include: *Fay v. Noia*, 372 U.S. 391, 394-95, 396 n.2 (1969);[1] *see also United States ex rel. Noia v. Fay*, 300 F.2d 345, 347 (2d Cir. 1962); *Rodriquez v. United States*, 395 U.S. 327, 328, 331 & n.3 (1969);[2] *see also Rodriquez v. United States*, 387 F.2d 117 (9th Cir. 1967); *Evitts v. Lucey*, 469 U.S. 387, 389 (1985); *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992) (*see Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994));[3] *Lozada v. Deeds*, 498 U.S. 430 (1991); and *Gairson v. Cupp*, 415 F.2d 352 (9th Cir. 1969). These cases are inapposite.

Some of the cases cited by Respondent require that a defendant request an appeal. *Abels v. Kaiser*, 913 F.2d 821 (10th Cir. 1990) is a guilty plea case. *Id.* at 822. However, as noted in the Petition for Writ of Certiorari, *Abels* requires that a defendant *ask* his/her attorney to file a notice of appeal. (Pet. at 18-19; *see also Abels*, 913 F.2d at 823 [". . . a defendant is denied effective assistance of counsel if he asks his lawyer to perfect an appeal and the lawyer fails to do so . . . ."; "Abels . . . had every right to expect that his counsel would follow his instructions in perfecting the appeal."].)

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1. Moreover, *Fay's* "deliberate bypass" standard has been overruled. *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991).

2. Indeed, *Rodriquez* cites a rule regarding appeal right advisements after trial. *Rodriquez*, 395 U.S. at 331 n.3. Further, *Rodriquez* is distinguishable for the additional reason that it was a habeas action by a *federal* prisoner. *Id.* at 328. No issue of federalism was involved (i.e., whether state courts can be bound by federal circuit courts).

3. Petitioner has previously noted that *Lozada* is distinguishable on this basis. (Pet. at 22-23.)

Likewise, *Estes v. United States*, 883 F.2d 645 (8th Cir. 1989) was a guilty plea case. *Id.* at 646-47. However, *Estes* followed the rule that an attorney's failure to file a notice of appeal, when so *instructed* by the client, constitutes ineffective assistance. *Id.* at 648-49. Further, *Estes* remanded for a hearing on whether the defendant asked his attorney to file an appeal. *Id.* at 649.[4]

In the present case, the District Court found that had Respondent requested that trial counsel file a notice of appeal, she would have done so. (Pet. at 21-22, citing Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 76 [Magistrate Judge's finding].)[5] Thus, because Respondent did not request the filing of a notice of appeal, *Abels* and *Estes* are inapposite.

Further, some of the cases cited by Respondent require that the trial attorney *know* of the defendant's desire to appeal. It is not clear whether *Riser v. Craven*, 501 F.2d 381 (9th Cir. 1974) was a guilty plea case or a trial case. However, *Riser* states a rule different from that articulated in *Stearns*, the rule at issue in the present case. In *Riser* the court stated that counsel's failure to protect a defendant's appeal rights is ineffective assistance when the attorney *knows* his client may want to appeal. *Riser*, 501 F.2d at 382.[6] Accordingly, the *Riser* court remanded the matter to determine, inter alia, whether counsel knew that defendant wanted to appeal. *Id.* at 382.

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4. *Estes* is also distinguishable because it was a habeas action by a federal prisoner. *Estes*, 883 F.2d at 647.

5. In light of this finding, it is clear that the notation on trial counsel's presentence report, "bring appeal papers," does not mean that Respondent requested an appeal.

6. On this point, *Riser*, 501 F.2d at 382, followed *Gairson v. Cupp*, 415 F.2d 352, and *Sanders v. Craven*, 488 F.2d 478 (9th Cir. 1973), discussed *post*.

By contrast, the rule articulated in *Stearns*, 68 F.3d at 330, is that even in a guilty plea case, a prisoner may obtain habeas relief merely by showing that he did not consent to counsel's failure to file a notice of appeal.[7] Thus, in *Stearns* there is no requirement that counsel know that the defendant wanted or might have wanted to appeal. Consequently, *Stearns* states a rule different from *Riser*.

Sanders v. Craven, 488 F.2d 478, was a guilty plea case. *Id.* at 479. But *Sanders* followed the rule in *Gairson*, 415 F.2d at 353 (a trial case [*id.* at 352]), that where an attorney *knows* his/her client wants to appeal (and other conditions are met) he/she has a duty to protect his/her client's appeal rights (by filing a notice of appeal or telling the client how to proceed). Applying this rule, the *Sanders* court remanded, stating that the district court would be interested in evidence regarding the attorney's awareness of defendant's desire to appeal. *Sanders*, 488 F.2d at 480.[8]

Again, the *Sanders-Gairson* rule is different from the *Stearns* rule which requires the petitioner to show only that he did not consent to the failure to file a notice of appeal. *Stearns*, 68 F.3d at 330.

Thus, the cases cited by Respondent do not assist him. They are frequently distinguishable because they involved convictions by trial rather than by guilty plea. Or they are inapposite because they stated rules different from *Stearns*: requiring a defendant's request for an

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7. *Stearns* is also distinguishable because it was a habeas action by a federal prisoner. (Pet. at 23.)

8. It is worth noting that in *Sanders* the underlying issue, a Fourth Amendment claim, was appealable despite the guilty plea. *Sanders*, 488 F.2d at 480. In the present case, there do not appear to have been any arguably meritorious appellate issues. (Pet. at 21.) This supports the conclusion that a reasonable attorney would not have been aware of Respondent's purported desire to appeal.

appeal or an attorney's knowledge that an appeal was desired. Thus, *Stearns* is a new rule barred by *Teague*.

Because *Stearns* is a new rule, which improperly relied on prior Ninth Circuit precedent in *Lozada*, 964 F.2d 956, this Court may reach the first question presented in Petitioner's Petition for Writ of Certiorari, namely, whether it is United States Supreme Court precedent, as opposed to federal circuit court precedent, which determines if a rule is "dictated by precedent" within the meaning of *Teague*.

II.

RESPONDENT SEEMS TO ACKNOWLEDGE THAT UNITED STATES SUPREME COURT AUTHORITY CONTROLS FOR *TEAGUE* PURPOSES; THIS COURT'S *LOZADA* DECISION IS INAPPOSITE

Respondent seems to agree that only United States Supreme Court precedent controls for *Teague* purposes. ("A new rule, by any definition, is made by the Supreme Court . . . . [¶] . . . The state can argue that a rule is a misstatement of the law, or not, but under its own argument, it is not a new rule barred by *Teague* unless the Supreme Court announces it." [Opp'n Br. at 9.]) Unfortunately, the Ninth Circuit does not seem to agree. In *Stearns*, the Ninth Circuit announced a new rule not based on United States Supreme Court precedent. The Ninth Circuit's response to Petitioner's *Teague* argument was that *Stearns* was based on the Ninth Circuit's decision in *Lozada*, 964 F.2d 956. (Pet., App. A at 5.) This underscores the need for this Court to grant certiorari on the question of whether United States Supreme Court authority alone is controlling precedent for *Teague* purposes.

Further, this Court's *Lozada* decision (498 U.S. 430) is not contrary to Petitioner's position.[9] This

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9. Referring to the failure to perfect an appeal, this Court stated in *Lozada*:

> Since *Strickland*, at least two Courts of Appeals have presumed prejudice in this situation. *See Abels v. Kaiser*, 913 F.2d 821, 823 (CA10 1990); *Estes v. United States*, 883 F.2d 645, 649 (CA8 1989); *see also Rodriquez v. United States*, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d

Court's *Lozada* decision impliedly adopted the presumed prejudice rule of *Abels* and *Estes*; however, this Court's *Lozada* decision does not suggest that circuit courts should always look to sister circuits to determine whether a rule is dictated by precedent within the meaning of *Teague*. Indeed, this Court's *Lozada* decision does not address *Teague*. It is therefore inapposite.

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340 (1969). The order of the Court of Appeals did not cite or analyze this line of authority as reflected in *Estes*, which had been decided before the Ninth Circuit issued its ruling.

Lozada, 498 U.S. at 432. Petitioner has previously distinguished *Lozada*, *Abels*, and *Estes*.

CONCLUSION

Thus, the cases cited by Respondent are inapposite. The Petition for Writ of Certiorari should be granted.

Dated: April 14, 1999.

Respectfully submitted,

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